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THE WEBB-POMERENE ACT¹

The Webb-Pomerene Act, designed to promote the American export trade through the legalization of export associations, became law on April 10, 1918. It is proposed in this paper to outline briefly the conditions that gave rise to a demand for such legislation; to trace the progress of the bill through Congress; to describe the provisions of the act; and to call attention to some possible objections. First as to the conditions that led to the passage of the Webb Act.

During the early years of the twentieth century it was freely predicted that American manufacturers, combined as many of them were in the modern trust, were to capture the markets of the world. Only a few years later the opinion was as commonly expressed that without legislation permitting co-operation in the American export trade our manufacturers were no match for their foreign competitors. Several reasons were given for the unequal conditions of competition. In the first place, American manufacturers in striving for business abroad had to meet the vigorous rivalry of powerful foreign combinations, often international in scope. These combinations were frequently aided by their respective governments, and in some cases participated in by these governments. The stock illustration was Germany, which had achieved the most notable successes in the rapid development of its foreign trade and which, being highly unpopular after 1914, furnished a good talking point. However, such combinations were common in other

¹ On the Webb-Pomerene Act see: *Congressional Record*, Vols. LIII-LVI; *Report of the Federal Trade Commission on Co-operation in American Export Trade*, in two parts; *House Report No. 1118*, 64th Congress, first session; *Senate Report No. 1056*, 64th Congress, second session; *House Report No. 50*, 65th Congress, first session; *Proceedings of the National Foreign Trade Conventions*; Duncan, *Journal of Political Economy*, XXV (1917), 313-38; Notz, *Journal of Political Economy*, XXVII (1919), 525-43; and Notz, *Yale Law Journal*, XXIX (1919), 29-45.

countries, for example, Belgium, Holland, Italy, and Japan. In Great Britain, on the other hand, despite the absence of widespread combination, a large and profitable export trade was being maintained. This was attributed to the unusually favorable conditions, notably the advantage of an early start, the possession of excellent shipping and banking facilities, and the high grade of service rendered by the British commission merchants, not to mention the export houses buying and selling goods for export on their own account. Some American companies, particularly the United States Steel Corporation, the Standard Oil Company, and the International Harvester Company, were admittedly strong enough to cope with these foreign combinations, yet the smaller concerns in these industries, as well as nearly all of the concerns in certain industries in which competitive conditions prevailed, were said to be at a great disadvantage. Hence the need of association.

Secondly, in the leading countries of the world associations for the promotion of export business were permitted, an advantage that the Sherman Act denied, so it was believed, to American exporters. In Germany, for example, prior to the war there were 600 important cartels, many of which dominated the export trade in their particular industry.¹ These cartels made an especial effort to extend the foreign trade, frequently selling at a loss in the endeavor to gain a foothold or to maintain a position once established. In order that such agencies might be met on more equal terms the association of American manufacturers in a common selling agency was held to be necessary. The need for such association, it may be observed, was not equally great in all branches of the export trade. Thus, American foodstuffs and raw materials could readily be sold even without an export organization, though co-operation might somewhat reduce the expenses of distribution and might increase the bargaining power of American producers. There was even less occasion for association of the manufacturers of specialties. Here the lack of standardization would make difficult the work of an export organization. Moreover, less competition was encountered in the sale of specialties, such as

¹ *Report of the Federal Trade Commission on Co-operation in the American Export Trade*, I, 5 (hereafter referred to as *Report on Co-operation in American Export Trade*).

safety razors, for example, and as a result co-operation was not so important. Of course, the exporters of specialties also had to create their market abroad, but many of them had found it to their advantage to do this individually.¹ It was in the manufactured staples that the advantages of co-operation were most marked. Such goods met vigorous competition abroad, often at the hands of large organizations. To capture foreign trade under such circumstances it was usually necessary to study the foreign requirements, to employ salesmen familiar with foreign conditions and customs, to advertise and demonstrate, to keep in touch with credit conditions so that credit might be extended wisely, to establish abroad branches and warehouses in order that the foreign customer might count on prompt and regular deliveries; in a word, to maintain an effective system of direct representation.

Even in the foreign trade in manufactured staples export associations were not always necessary or even advantageous. In many branches there existed highly efficient export commission houses handling sales on a commission basis and export merchants buying and selling goods on their own account. These agencies in both Great Britain and the United States had played a notable part in the development of export trade. In fact, British export trade had been largely built up through their efforts.² These export houses had already developed efficient organizations, which were familiar with foreign conditions; and they now possess an advantage over associations in this country by virtue of the fact that they handle imports as well as exports, whereas the American associations under the provisions of the Webb Act may deal solely in exports. For the export houses, owning their own ships, as many of them do, the handling of imports as well as exports represents an undoubted saving in transportation, in that it more commonly provides a cargo in both directions. However, direct representation of manufacturers also has its advantages. Thus, it is to be anticipated that the foreign trade in any particular article and of course the domestic trade also, will be more effectively pushed by an agency whose capital is invested in plants and equipment

¹ *Report on Co-operation in American Export Trade*, I, 375.

² *Ibid.*, I, 94; II, 320.

devoted to the manufacture of that product than by an agency having no such investment and dealing in a great variety of products. An association obviously has an individual interest in its product—an interest which an export house in the very nature of the case lacks.

Thirdly, in some of the foreign markets American producers were confronted with well-organized combinations of buyers. Thus, four London concerns were said to fix the price of silver, and American exporters in making sales in Great Britain, India, and elsewhere had to accept the price fixed by these firms.¹ For some time past the world's copper trade had been controlled by a German metal-buying agency.² Such associations, it was said, by playing off one American exporter against another were able to beat down the price of American goods destined for export. In the case of copper the above-mentioned German concern, according to Mr. John D. Ryan, president of the Amalgamated Copper Company, by means of such tactics bought American copper delivered abroad during 1903-13 at $\frac{8.3}{10.0}$ of a cent per pound less than domestic buyers paid for delivery at New York or the Connecticut Valley.³ The association of American producers in a selling agency, it was claimed, would eliminate the competition between American firms, and thus make it possible for them to secure better prices for articles sold abroad.

Finally, the development of our export trade was said to be hampered by inadequate banking and credit facilities abroad; by discrimination against American goods by foreign steamship lines; by the small amount of American investments in the securities of foreign companies; and by our comparative inexperience. The last obstacle perforce had to be overcome by the producers and manufacturers themselves. Upon them necessarily fell the task of developing the requisite organization, of acquiring an intimate acquaintanceship with the requirements of foreign markets, and, by attention to quality and service, of creating a demand for products "made in America." The additional business that comes through investments in foreign enterprises was to be secured by a campaign

¹ *Ibid.*, I, 7.

² *Ibid.*

³ *Ibid.*, II, 261.

to educate American investors in the advantages of foreign securities, a campaign now well under way. The other difficulties were to be met by legislation permitting foreign banking, establishing an American merchant marine, and authorizing producers and manufacturers to combine for export purposes. The Webb bill was thus only one stone in the foundation upon which our increased foreign trade was to rest.

The desirability of legalizing associations for export trade was inquired into by the Federal Trade Commission under the powers granted to it in section 6 (*h*) of the Trade Commission Act, and a decision highly favorable to the principle underlying the Webb Act was reached.¹ The Commission pointed out that such large concerns as the United States Steel Corporation, the International Harvester Company, the United Shoe Machinery Company, the National Cash Register Company, the General Electric Company, and others did not need to enter into export associations, since they individually were well able to compete with foreign combinations.² The purpose of the Webb bill was to enable a number of smaller companies not having a large enough volume of business to justify the carrying on of an export trade by themselves to cooperate for this purpose and, by distributing the overhead charges over their combined foreign sales, to bring the costs down to a reasonable figure. Other advantages to be gained through cooperative action were the securing of better credit information and thus the better financing of foreign business, an ability to give longer credits where desirable, the greater ease with which initial losses could be carried, a larger assortment of goods, and the exchange of ideas among the members of the association. While there is some reason to believe that an association of competing concerns to share the expenses of a foreign selling agency was not in fact prohibited by the anti-trust laws,³ provided it did not embrace too large a percentage of the trade, nevertheless the

¹ *Report on Co-operation in American Export Trade*, I, 379.

² *Ibid.*, I, 161-62, 242.

³ Some such associations, believed to be legal, had been organized prior to the passage of the Webb Act. See *Official Report of the Fourth National Foreign Trade Convention* (1917), p. 187.

uncertainty as to the legal status of such an arrangement had deterred many concerns that were anxious to co-operate from making the venture. The Commission after a study of the legal aspects of the problem was unable to assure manufacturers that common selling agencies were lawful; and accordingly it recommended the passage of an act that would place this right beyond dispute. This recommendation was made, however, subject to the condition that ample precautions be taken to prevent the export associations from being used to restrain trade in the United States in violation of the Sherman law.¹

The campaign to legalize export associations was launched at the first convention of the National Foreign Trade Council, held in Washington, D.C., toward the close of May, 1914. There was thus no connection between the initiation of this movement and the European war. However, the outbreak of the war, followed as it was by a short period of depression in this country, presented conditions favorable for an agitation to legalize combinations for the export trade, it being alleged that foreign business was necessary to "keep the home fires burning" and to provide employment for labor. In May, 1915, the Federal Trade Commission, organized only two months previously, began an investigation of the foreign trade with particular reference to the advisability of permitting co-operation. A summary of its findings, made public in May, 1916, strongly recommended the enactment of permissive legislation.² At the date of this report a vast foreign trade was being carried on, and there was no immediate occasion for concern on this score. The campaign cry was thus modified to meet the new situation. Attention was now directed to the tremendous struggle for foreign trade that would manifest itself upon the conclusion of hostilities, and the country was urged by the interested parties to have its loins girded for the fray when it arrived.

The Webb bill was first introduced in the House by Representative Webb of North Carolina on August 8, 1916, some three months after the publication of the summary of the report of the

¹ *Report on Co-operation in American Export Trade*, I, 10.

² The full report, in two volumes, though dated June 30, 1916, was not published until December, 1916.

Federal Trade Commission. It was referred to the Committee on the Judiciary, of which Mr. Webb, who had so skilfully and tactfully piloted the Clayton Act through the House two years previously, was chairman. After being amended in important particulars, the significance of which will be noted later,¹ it passed the House on September 2 by a vote of 199 to 25.² Six days later the Senate adjourned, and the Webb bill was permitted to slumber in committee.

President Wilson in his address to the next Congress on December 5, 1916, urged the prompt passage of the Webb bill.³ He presented no argument on behalf of the bill, but merely pointed out that a great opportunity in foreign trade had presented itself, and that this opportunity might escape us if we hesitated or delayed to remove the legal obstacles that stood in the way.

Notwithstanding the recommendation of the President the Webb bill made practically no progress during the short session from December 4, 1916, to March 4, 1917. The Senate Committee on Interstate Commerce, of which Senator Pomerene was chairman, reported out the bill on February 16, 1917, with amendments, but the measure was not discussed in either the Senate or the House.

During the next session (April 2—October 6, 1917) the bill in amended form passed the House for the second time, but did not come to a vote in the Senate. The bill as reported out by the House Committee on the Judiciary on May 11, 1917, was revised in several important particulars to conform to the suggestions of the Senate Committee on Interstate Commerce. As revised by the House Committee, but without any further changes, it passed the House on June 13 by a vote of 242 to 29, having been debated on only one day, the day of its passage.⁴ The measure was briefly debated in the Senate on three separate days, but it was not put to a vote, Senator Pomerene having concluded after an investigation that it was impossible to secure action during the current session.⁵

¹ See pp. 761 ff.

² *Congressional Record* (September 2, 1916), p. 13732.

³ *Ibid.* (December 5, 1916), p. 17.

⁴ *Ibid.* (June 13, 1917), p. 3584.

⁵ *Ibid.* (September 29, 1917), p. 7515.

With the convening of the second session of the Sixty-fifth Congress, President Wilson on December 4, 1917, again called the attention of Congress to the Webb bill, saying it "ought by all means to be completed at this session."¹ On this occasion the Senate was prompt indeed. It debated the measure for four days, and on December 12 accepted it, slightly amended, by a vote of 51 to 11.² The House objected to the Senate amendments, and conferees were therefore appointed. The report of the conference committee was presented on April 2, 1918, and was accepted by both the Senate and the House on April 6. The bill was signed by the President on April 10.

The act is divided into five sections. Section 1 is devoted to a definition of certain terms used in the act. The word "association" is defined as "any corporation or combination, by contract or otherwise, of two or more persons, partnerships, or corporations." The words "export trade" mean "solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but . . . shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale."³

The bill as it had passed the House on September 2, 1916, instead of providing that "export trade" should not be deemed to include the production, manufacture, *or selling for consumption or for resale* within the United States of exported goods, had provided that it should not be deemed to include the production, manufacture, *trading in, or marketing* within the United States of such goods.⁴ In this form obviously the measure was highly unsatisfactory to those desiring to form export associations; for unless

¹ *Congressional Record* (December 4, 1917), p. 20.

² *Ibid.* (December 12, 1917), p. 186.

³ In the opinion of the Federal Trade Commission, trade with the Philippine Islands, Porto Rico, and Hawaii is not export trade (*Annual Report* [1918], p. 40).

⁴ See text of bill in *Annual Report of the Federal Trade Commission* (1916), pp. 60-61.

an export association could either produce or trade in, that is, buy, the articles to be exported, its activities would be limited to handling goods on a commission or agency basis, if indeed that was permissible. If it was deemed advisable to allow export associations there was no virtue in unduly hampering them; and accordingly the Senate struck out the words "trading in or marketing" and substituted the words "or selling for consumption or for resale." By these changes, concurred in by the House, an export association was permitted to purchase goods in this country for export purposes, but it might not produce them itself nor sell them in this country.

Section 2 provides that nothing in the Sherman Act of 1890: shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

Section 2 of the act as above quoted is identical with the bill as it first passed the House down to the words "in restraint of trade within the United States"; but differs vitally from that point on. The House bill had legalized export associations provided they were not in restraint of trade within the United States, and provided they did not *restrain the export trade of the United States*.¹ The Senate Committee on Interstate Commerce pointed out that this second proviso took away a right granted elsewhere in the bill to enter into associations and make agreements in restraint of export trade; and it accordingly modified the proviso so that it merely forbade a restraint of the export trade of *any domestic*

¹ This second proviso was not in the bill as originally introduced in the House by Mr. Webb, but he agreed to the change; see *Congressional Record* (September 2, 1916), p. 13725.

*competitor of such association.*¹ This change was accepted by the Senate and the House. Having removed, however, the prohibition against the restraint of the export trade of the United States, it became necessary to provide in some way against the use of such associations to influence prices improperly in this country. Accordingly the Senate Committee added the last proviso dealing with prices in the United States. The bill as it became law is identical with the amendment of the Senate Committee except in three particulars: (1) the Senate inserted the words "or depresses" after "enhances" in order to prevent export associations from beating down the prices of goods purchased by them;² (2) the Senate struck out the words "and unduly" enhances prices, from an uncertainty as to the meaning of "undue" enhancement;³ and (3) the conference committee added the words at the close of section 2 reading "or which substantially lessens competition within the United States or otherwise restrains trade therein."

Section 3 amends section 7 of the Clayton Act by providing that any corporation may acquire all or part of the stock or other capital of any company organized in accordance with the terms of the Webb Act, "unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States." This section is identical in language with the corresponding section of the bill as it first passed the House on September 2, 1916.

Section 4 declares that the provisions of the Trade Commission Act with regard to unfair methods of competition "shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States." This section extends the jurisdiction of the Federal Trade Commission over unfair competition to foreign trade as well as to domestic; and is in line with a recommendation of that body in its report on Co-operation in American Export Trade.⁴ The prohibition of unfair competition, it should be observed, relates only to methods used against

¹ *Senate Report No. 1056*, 64th Congress, second session.

² *Congressional Record* (May 23, 1917), p. 2787, and (September 22, 1917), p. 7325.

³ *Ibid.* (December 12, 1917), p. 184.

⁴ I, 380.

American competitors engaged in export trade. The section says, to be sure, competitors engaged in export trade, without qualification, yet since export trade is defined as trade in goods exported from the United States it is clear that it applies only to American competitors. The provisions of section 4 are applicable not only to associations but also to corporations and individual exporters.

Section 5 provides that every association organized under the act shall file with the Federal Trade Commission a statement giving certain information, including the location of its offices, the names and addresses of all of its officers, stockholders, or members, and a copy of its articles of incorporation or association; and that on January 1 of each year a similar statement, noting changes, if any, shall be made. Every association "shall also furnish to the commission such information as the commission may require as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals." Any association failing to comply with these requirements is to be denied the benefits of sections 2 and 3 of the act, and to be subject to a fine of \$100 per day to be recovered by the attorney-general.

The foregoing provisions are substantially as in the original House bill, except for the clause, inserted in the Senate, permitting the commission to inquire into the organization, business, etc., of export associations. But because of its amendments to section 2, dealing with the effect of export associations on prices or competition in the United States, the Senate deemed it advisable to add another paragraph to section 5 establishing administrative machinery for the enforcement of the restrictions imposed in section 2. It accordingly provided that whenever the Federal Trade Commission had reason to believe that the provisos of section 2 had been violated, it should conduct an investigation; and if upon investigation it concluded that the law had been violated "it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law." If the association fails to comply with the recommendations of the Federal Trade Commission, the latter is to refer its findings and

recommendations to the attorney-general for such action as he may deem proper. This paragraph was accepted by the House.

In the House an attempt had been made to require associations desiring to benefit by this act to secure a permit from the Federal Trade Commission, and to authorize the Commission to refuse such permits, and once having issued them to cancel them for cause after a hearing. The author of this amendment took the position that, if permits were required, and were held subject to good behavior, administrative supervision would be effective, as it would not be if offenders had to be haled into court. The objection was made that this would vest a dangerous power in the Commission, and the proposition was rejected by a vote of 131 to 11.¹

A third and final paragraph gave the Commission, in the enforcement of these provisions, all the powers, where applicable, given it in the Trade Commission Act of September 26, 1914.

The advantages of export associations have been stated. We may now consider some of the possible disadvantages.

The chief objection to the export associations authorized by the Webb Act is that they may be used as a means of restricting competition in the domestic market. The Federal Trade Commission recognized this danger, but expressed the opinion that it would be possible through administrative supervision to prevent these organizations from being employed in this fashion. Others, however, doubt whether this is possible. If all the concerns in a given industry are associated in a common enterprise, they will tend to draw together and to pursue a harmonious policy with regard to domestic business. The Gary dinners in the steel trade were a remarkably effective device in maintaining a policy of co-operation that was equivalent to the fixing of prices. These dinners were illegal and they were discontinued. However, meetings of these same groups through the medium of an export association are not illegal; and it will be exceedingly difficult, if not impossible, to prevent some understanding being arrived at with regard to domestic prices and output. This is the more true since the export associations will naturally fix export prices, and an agreement as

¹ *Congressional Record* (June 13, 1917), pp. 3578, 3580, 3584.

to the relationship between export and domestic prices can readily be effected. Whether or not it be true, as alleged by the minority of the House Committee on the Judiciary, that the Webb legislation was sought "not so much for its value in the foreign trade as for the effect it would have on the domestic trade,"¹ it is hardly to be doubted that a restraint of domestic trade will be the practical result in some, if not numerous, instances.

A second possibility is that the Webb Act will promote international combination. Even prior to the enactment of this measure there had been international combinations in steel rails, powder, tobacco, thread, and other products, the underlying purpose of these combinations being the maintenance of an undisputed position in the domestic market. So far as the United States is concerned these arrangements will now be legal, since such restrictions as the Sherman Act imposed on restraints of foreign trade are now removed, providing the restraint of the export trade does not restrain trade within the United States and does not restrain the export trade of a domestic competitor of the export association. It is also to be anticipated, the provisos in section 2 to the contrary notwithstanding, that the effect of an extension of international combination will be to reduce the effectiveness of foreign competition in this country, that is, where the absence of a protective tariff has permitted such competition to exist.

Another result of the organization of export combinations in the United States may be a further extension of foreign combinations, in order that foreign buyers may be in a position to bargain effectively with American export sales agencies. The ultimate consequences of pitting a single American seller against a single foreign buyer in each country, if it should come to that, are not easy to foresee, yet it is clear that there exists the possibility of prolonged negotiations during the pendency of which the export trade will greatly suffer.

Finally, there is danger lest the pursuit of trade by large groups will tend to upset once more the peace of the world. The House Committee on the Judiciary, in advocating the passage of the Webb bill, declared that export trade, by virtue of the methods adopted

¹ *House Report No. 50*, 65th Congress, first session.

by other leading countries, had become "largely a matter of competition between nations."¹ If the government of the United States is to become a party to this international rivalry for trade, it must be in a position to support its foreign trade agencies by force of arms, if necessary, with consequences that may easily be foreseen by anyone who has learned the lessons of the recent war. It may be, therefore, that it is not necessary for us to run these risks, particularly in view of the insistent demand abroad for American products and in view of the immense proportions of our domestic trade.

In conclusion, it may be said that while it is difficult at this early date to appraise fairly the results of the Webb Act, there is some reason to fear that its consequences so far as both domestic and foreign trade are concerned will be harmful, even though it leads to a considerable increase in our export trade. The author can only hope that the later course of events will prove this gloomy foreboding to be unjustified.

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¹ *House Report No. 1118*, 64th Congress, first session.